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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, A CO-PARTNERSHIP, COMPOSED OF J. WARREN KEIFER, JR., AND OSWIN KEIFER, PETITIONER,

vs.

RECONSTRUCTION FINANCE CORPORATION AND REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1938.

CERTIORARI GRANTED OCTOBER 24, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA, OMAHA DIVISION

Law. No. 3627

KEIFER AND KEIFER, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer, Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORATION, a Corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation, Defendants

PETITION—Filed December 14, 1936

Plaintiff for causes of action alleges:

First Cause of Action

(1) That defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, a corporation, hereinafter for the sake of brevity referred to as Regional, is a corporation created under an act of Congress authorizing the Reconstruction Finance Corporation to create a Regional Corporation in any Federal Land Bank District; that pursuant thereto the Reconstruction Finance Corporation, a corporation, issued a charter to the defendant Regional Agricultural Credit Corporation on September 10, 1932, a copy of which is attached hereto, marked Exhibit A and by this [fol. 2] reference made a part hereof; that the defendant Regional maintains a branch office in Nebraska located in Omaha, Douglas County, Nebraska.

(2) That the Reconstruction Finance Corporation is a corporation authorized and created by an act of Congress and was by said act specifically authorized to sue and be sued; that the Reconstruction Finance Corporation, hereinafter referred to as the R. F. C. for the sake of brevity, subscribed and paid for all of the capital stock of the defendant Regional; that by the act of Congress providing for the creation of the defendant Regional by the R. F. C., the

R. F. C. was authorized and directed to supervise and pay all expenses incurred in connection with the operation of the said Regional Agricultural Credit Corporation; that by virtue of said provision the defendant R. F. C. created, financed, owned and supervised the defendant Regional at the time of the acts and omissions herein complained of and that said acts and omissions of the defendant Regional were the acts and omissions of the defendant R. F. C.; that defendant R. F. C. maintains a branch office in Nebraska located in Omaha, Douglas County, Nebraska.

(3) That the causes of action herein set forth arise under the laws of the United States.

(4) That plaintiff on or about the 21st day of October, 1934, delivered to the defendant Regional 388 head of cattle, consisting of 197 cows, 5 bulls and 186 calves; that the defendants orally agreed with plaintiff to winter said livestock in a careful and efficient manner, provide the livestock with good grassland, plenty of feed of all kinds and water, and to have them taken care of by experienced and capable livestock men, and defendants agreed to return to plaintiff all of said livestock in the spring of the year in as good condition as when turned over to defendants; that defendants agreed to feed and care for said cattle in a competent manner during the winter of 1934-35.

(5) That thereafter and after the aforementioned cattle were placed in the hands of defendant Regional, defendant Regional by false and fraudulent representations and by coercion, hereinafter set forth, and by taking advantage of plaintiff's necessities, fraudulently induced plaintiff to enter into a pretended contract by the terms of which plaintiff purported to waive damages caused by defendants; that such a waiver of damages is unconscionable, unlawful and unenforcible because of the unreasonableness of the terms thereof, and because said pretended waiver was obtained [fol. 3] by fraud and coercion as follows, to-wit; that defendant Regional represented that said new written contract was not materially different from the oral contract under which plaintiff had previously given possession of said livestock to defendant Regional, represented that if plaintiff would sign said new contract, defendant Regional would winter the cattle with plenty of feed, upon good hay land, with experienced and capable men and in the spring

the livestock would be in better, or as good, condition as when possession was turned over to defendant Regional; that by turning said cattle hereinbefore described over to the defendant Regional, plaintiff would be able to avoid loss of any of his livestock; that defendants at the time said promises were made had no intention to keep or perform said promises; that plaintiff's partners are unskilled in the use of technical terms and were unaware of the pretended waiver contained in said unconscionable agreement or the meaning thereof; that the aforesaid oral representations were relied upon by plaintiff in signing said purported contract; that said representations were relied upon by plaintiff in executing the contract presented by the Regional; that said representations, and each of the same, were false and untrue and that said purported waiver is of no force and effect; that defendant Regional further threatened that the cattle owned by plaintiff, subject to a mortgage to defendant Regional, would be sold immediately; that said purported waiver is of no force and effect because of said fraudulent and unlawful acts of defendants.

(6) That defendant Regional having obtained possession of said livestock was negligent in that:

(a) It knowingly employed inefficient help on, and unskilled management of, the ranch near Whitman, Nebraska, upon which said cattle were placed by the Regional for wintering.

(b) It failed to provide feed for said cattle for a long period of time; placed the cattle upon pasture which had been grazed bare.

(c) Drove the cattle into Whitman in long, unreasonable drives, at a fast pace; kept the cattle at night where no feed or water was available during said drives.

(d) Fed the cattle a cotton-seed compound, known as cake, in such a manner that the larger and stronger of the cattle ate too much, became foundered, ill and weakened and said feed being inaccessible to the small and weaker, a great number of the cattle obtained none and became weak from hunger and died or were permanently injured.

[fol. 4] (e) Sold hay which was available for feed and which was represented to plaintiff would be fed said cattle,

later ran short of hay and al-owed the cattle to go without hay or feed and to become weakened and underfed.

(f) Gave no care to cattle becoming sick, or heavy with calf, allowing many to die and gave no care to calves dropped causing the loss of the calves.

(g) Gave no care to the cattle during a long rain and snowstorm, but allowed the cattle to drift and become lost, wander into the open and suffer [great] from said storm, whereby many of said cattle perished.

(h) Sold a portion of plaintiff's cattle at a public sale almost immediately after the heavy storm hereinbefore mentioned at a time when the cattle were in bad condition for sale and at a time and place where the market was not likely to be, and was not, profitable to plaintiff.

(i) Failed to protect said cattle from theft and straying.

(7) That after the delivery of said 388 head of cattle to the defendants and their arrival at Whitman, Nebraska, the defendants further offered to fatten the 186 calves in defendants' possession during the winter months; that defendants agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain and so handle such calves that the calves would gain 200 pounds or more per head by late spring of 1935; that said plaintiff accepted the offer of the defendants and allowed the defendants to move the calves under the above contract.

That the defendants shipped said calves to Melbeta, Nebraska, and that the defendants thereafter negligently failed to care for and maintain said calves but allowed the same to become greatly damaged by the following negligent acts, to-wit:

(a) Defendants placed said calves and the calves of others in a small feed lot; that the calves were crowded and no space for free movement of the calves was available.

(b) That said calves were not fed regularly or properly.

(c) That said calves were not watered regularly or properly.

(d) That the feed lot was not kept clean, in that manure was allowed to accumulate to a depth of several feet.

(e) That defendants knowingly employed incompetent, inexperienced and inefficient help to care for said calves.

[fol. 5] (f) That no care was given said calves during inclement weather; that no sufficient shelter was provided; that the water supply available, if any, was allowed to become inaccessible through freezing.

(8) That as a result of the negligent acts of defendants hereinbefore alleged, or one or more of them, plaintiff has suffered the following items of damage to livestock placed in defendants' care, to-wit:

(a) The death of 36 cows of a reasonable value of $56.00 each or a total of $2016.00.

(b) The loss through straying, theft, wrongful sale, or death of 12 cows of a reasonable value of $56.00, each, or a total of $672.00.

(c) The loss of the calf crop, which the 197 head of cows turned over to the defendants would have had and which could have been returned to plaintiff above the 29 dropped by said cows and returned except for defendants' negligent acts aforesaid, a total of 157 calves of a value of $25.00 each or a total of $3925.00.

(d) Each cow returned to plaintiff by defendants was of $30.00 less value than these same cattle when delivered to defendants, with a total loss to plaintiff upon the 148 cows returned of $4440.00. Each bull returned to plaintiff by defendants was of $50.00 less value than these same bulls when delivered to defendants, with a total loss to plaintiff upon the 5 bulls returned of $250.00.

(e) The loss of the 1936 calf crop from the fact that 148 cows returned were in such poor condition that they would not breed, to plaintiff's damage in the sum of $3000.00.

(f) The death of 8 calves of a reasonable value of $50.00 per head caused by the negligence of defendants hereinbefore alleged, or a damage to plaintiff by defendants of $400.00.

(g) The wrongful and unauthorized sale of 128 head of plaintiff's calves at a time when through the negligent acts of defendants hereinbefore alleged, the calves were in poor condition and should not have been offered for sale; that de-

fendants, knowing these facts, nevertheless, wrongfully and negligently, sold said 128 head to plaintiff's loss in the sum of $32.00 per head, or a damage to plaintiff by defendants' negligence in the sum of $4096.00.

(h) The lean, weakened and unhealthful condition of the 50 head of calves returned to plaintiff, which condition [fol. 6] caused to plaintiff a loss of $15.00 per head, or a damage to plaintiff by defendants' negligence in the sum of $750.00.

That plaintiff has thereby been damaged in the total sum of $19,549.00.

Second Cause of Action

(1) Plaintiff makes a part hereof as though set forth herein in full paragraphs 1, 2, 3, 5 and 6 of the first cause of action herein, making the same applicable to Albert Berzina as plaintiff's assignor.

(2) Alleges that Albert Berzina on May 22, 1936 transferred and assigned to the plaintiff herein his claim and cause of action against defendants as set forth in this cause of action for the purpose of collection; that attached hereto and marked Exhibit B is a copy of said assignment and, except for the date, signature and witness, all of said assignments are identical in form; that said assignment is now in the possession of this plaintiff.

(3) That on or about the 7th day of November, 1934, Albert Berzina placed in the hands of the defendant Regional 108 head of Hereford cattle; that because of various head being withdrawn during the winter season and because of the escape of part of the cattle under the control of the defendants to Albert Berzina's premises, Albert Berzina and defendants mutually agreed to fix the number of cattle defendants wintered for said Berzina at 70 head, and that charges for wintering would be made on the basis of 70 head of cattle; that the defendants agreed with plaintiff to winter said 108 head of livestock in a careful and efficient manner, provide the livestock with water, good grassland, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men and defendants agreed to return to plaintiff all of said livestock in the spring of the year; that defendants agreed to feed and care

for said cattle in a competent manner during the winter of 1934-1935.

(4) That as a result of the grossly and wilfully negligent acts of defendants hereinbefore alleged, Albert Berzina and plaintiff, as trustee, have suffered the following items of damage to livestock placed in defendants' care, to-wit:

(a) The loss through straying, theft or death of 21 cows of a reasonable value of $56.00 or a total of $1176.00.

(b) The loss of the calf crop, which the 108 head of cattle turned over to defendants would have had except for de- [fol. 7] fendants' negligent acts aforesaid, a total of 100 calves of a value of $25.00 each, or a total of $2500.00.

(c) Each cow returned to Albert Berzina by defendants was of $25.00 less value than these same cattle when delivered to defendants, with a total loss to Albert Berzina and plaintiff as assignee from the eighty-seven cows returned of $2175.00.

That Albert Berzina and plaintiff as assignee, have thereby been damaged in the total sum of $5851.00.

Third Cause of Action

(1) Plaintiff makes a part hereof as though set forth herein in full paragraphs 1, 2, 3, 5 and 6 of the first cause of action herein, making the same applicable to John R. Jochem as plaintiff's assignor.

(2) Alleges that John R. Jochem on May 23, 1936 transferred and assigned to the plaintiff herein his claim and cause of action against defendants as set forth in this cause of action for the purpose of collection; that attached hereto and marked Exhibit B is a copy of said assignment and, except for the date, signature and witness, all of said assignments are identical in form; that said assignment is now in the possession of this plaintiff.

(3) That John R. Jochem on or about the 3rd day of November, 1934 placed in the hands of the defendant Regional 158 head of cattle as follows: 125 Hereford cows and 33 Hereford branded calves; that the defendants agreed with plaintiff to winter said livestock in a careful and efficient manner, provide the livestock with water, good grassland, plenty of feed of all kinds and to have them

taken care of by experienced and capable livestock men and defendants agreed to return to John R. Jochem all of said livestock in the spring of the year in as good condition as when turned over to defendants, reasonable loss excepted; that defendants agreed to feed and care for said cattle in a competent manner during the winter of 1934-35.

(4) That as a result of the grossly and wilfully negligent acts of defendants hereinbefore alleged, John R. Jochem and the plaintiff, by assignment have suffered the following items of damage to livestock placed in defendants' care, to-wit:

(a) Death of twelve cows of a reasonable value of $56.00 each or a loss of $672.00.

(b) The loss through straying, theft or death of eleven cows of a reasonable value of $56.00, or a loss of $616.00.

[fol. 8] (c) The loss through straying, theft or death of eight branded calves of a reasonable value of $25.00 or a loss of $200.00.

(d) The loss of the calf crop, which the 124 head of cattle turned over to the defendants would have had except for defendants' negligent acts aforesaid, a total of 72 calves of a value of $30.00 each, or a total of $2160.00.

(e) Each cow and calf returned to John R. Jochem by defendants was of $25.00 less value than these same cattle were when delivered to defendants with a total loss to plaintiff upon the 124 cows and calves returned of $3100.00.

That John R. Jochem and [plea-ntiff], as assignee, were thereby damaged in the total sum of $6748.00.

Fourth Cause of Action

(1) Plaintiff makes a part hereof as though set forth herein in full paragraphs 1, 2, 3, 5 and 6 of the first cause of action herein, making the same applicable to Gustav Jochem as plaintiff's assignor.

(2) Alleges that Gustav Jochem on May 20, 1936 transferred and assigned to the plaintiff herein his claim and cause of action against defendants as set forth in this cause of action for the purpose of collection; that attached hereto and marked Exhibit B is a copy of said assignment and,

except for the date, signature and witness, all of said assignments are identical in form; that said assignment is now in the possession of this plaintiff.

(3) That on or about the 25th day of October, 1934, Gustav Jochem placed in the hands of the defendant Regional 78 head of cattle; that the defendants agreed with plaintiff to winter said livestock in a careful and efficient manner, provide the livestock with water, good grassland, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men and defendants agreed to return to Gustav Jochem all of said livestock in the spring of the year in as good condition as when turned over to defendants, reasonable loss excepted; that defendants agreed to feed and care for said cattle in a competent manner during the winter of 1934-1935.

(4) That as a result of the grossly and wilfully negligent acts of defendants hereinbefore alleged, plaintiff has suffered the following items of damage to livestock placed in defendants' care, to-wit:

(a) The death of 18 cows of a reasonable value of $56.00 each, or a total of $1008.00.

[fol. 9] (b) The loss through straying, theft or death, of ten cows of a reasonable value of $56.00, or a total of $560.00.

(c) The loss of the calf crop, which the 75 head of cattle turned over to defendants would have had except for defendants' negligent acts aforesaid, a total of 75 calves of the value of $25.00 each, or a total of $1875.00.

(d) Each cow returned to plaintiff by defendants was of $25.00 less value than these same cattle when delivered to defendants, with a total loss to plaintiff upon the 45 cows returned of $1125.00.

That Gustav Jochem and plaintiff, as assignee, have thereby been damaged in the total sum of $4568.00.

Fifth Cause of Action

(1) Plaintiff makes a part hereof as though set forth herein in full paragraphs 1, 2, and 3 of the first cause of action herein, making the same applicable to Charles J. Mach as plaintiff's assignor.

(2) That defendants offered to Charles J. Mach to fatten 193 head of his calves during the winter months; that defendants agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain and so handle such calves that the calves would gain 200 pounds or more per head by late spring of 1935; that said Charles J. Mach accepted the offer of the defendants and allowed the defendants to move the calves under the above contract.

That the defendants shipped said calves to Melbeta, Nebraska, and that the defendants thereafter negligently failed to care for and maintain said calves but allowed the same to become greatly damaged by the following negligent acts, to-wit:

(a) Defendants placed said calves and the calves of others in a small feed lot; that the calves were crowded and no space for free movement of the calves was available.

(b) That said calves were not fed regularly or properly.

(c) That said calves were not watered regularly or properly.

(d) That the feed lot was not kept clean, in that manure was allowed to accumulate to a depth of several feet.

[fol. 10] (e) That defendants knowingly employed incompetent, inexperienced and inefficient help to care for said calves.

(f) That no care was given said calves during inclement weather; that no sufficient shelter was provided; that the water supply available, if any, was allowed to become inaccessible through freezing.

(3) Alleges that Charles J. Mach on the 3rd day of December, 1936 transferred and assigned to the plaintiff herein his claim and cause of action against defendants as set forth in this cause of action for the purpose of collection; that attached hereto and marked Exhibit B is a copy of said assignment and, except for the date, signature and witness, all of said assignments are identical in form; that said assignment is now in the possession of this plaintiff.

4. That as a result of the grossly and wilfully negligent acts of defendants hereinbefore alleged, plaintiff, as as-

signee of Charles J. Mach, has suffered the following damages to the livestock placed in defendants' care, to-wit:

(a) The wrongful and unlawful sale of 31 head of calves; that said calves if returned in the condition defendants agreed to return them would have had a reasonable value of at least $50.00 per head; that Charles J. Mach and plaintiff, as assignee, were thereby damaged in the sum of $1550.00.

(b) The death of 8 calves of a reasonable value of $50.00 per head, caused by the negligence of the defendants hereinbefore alleged, or a damage to Charles J. Mach and plaintiff, as assignee, by defendants of $400.00.

(c) The return of 154 calves in a weak, unhealthy, starved and lean condition due to defendants' negligence which condition caused to Charles J. Mach, and plaintiff as assignee, a loss of $15.00 per head or a damage to plaintiff by defendants' negligence in the sum of $2310.00.

That Charles J. Mach and plaintiff, as assignee, have thereby been damaged by defendants' negligence in a total sum of $4260.00.

Wherefore plaintiff prays judgment against the defendants and each of them upon its first cause of action in the sum of $19,549.00; upon its second cause of action in the sum of $5851.00; upon its third cause of action in the sum of $6748.00; upon its fourth cause of action in the sum of $4568 [fol. 11] and upon its fifth cause of action in the sum of $4260.00, or a total sum of $40,976.00.

Keifer and Keifer, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer, Plaintiff, by Perry, Van Pelt and Marti, Its Attorneys.

[File endorsement omitted.]

EXHIBIT "A" TO PETITION

Charter of Regional Agricultural Credit Corporation of Sioux City, Iowa

Washington, D. C.
September 10, 1932.

Whereas, the Reconstruction Finance Corporation deems it desirable to create a regional agricultural credit corpora-

tion in Federal Land Bank District Number Eight, comprising the States of Iowa, Nebraska, South Dakota and Wyoming, and with its principal office in the City of Sioux City, State of Iowa,

Now, Therefore, The Reconstruction Finance Corporation does hereby create, and grant this charter to, the Regional Agricultural Credit Corporation of Sioux City, Iowa; and said Regional Agricultural Credit Corporation of Sioux City, Iowa, is hereby authorized and empowered to do and perform all acts and transact all business which, by implication or otherwise, is permitted legally to be done, performed and transacted by a regional agricultural credit corporation, under and in accordance with the act of Congress, approved July 21, 1932, known as the "Emergency Relief and Construction Act of 1932", and to do all other things incidental thereto, and necessary or appropriate in connection therewith, within the States of Iowa, Nebraska, South Dakota and Wyoming, and within the such other state or states, or parts thereof, as the Reconstruction Finance Corporation, acting by and through its Board of Directors, may at any time and from time to time prescribe or permit.

Said Regional Agricultural Credit Corporation of Sioux City, Iowa, shall be managed by officers and agents appointed by the Reconstruction Finance Corporation, under [fol. 12] such rules and regulations as the Board of Directors of the Reconstruction Finance Corporation may prescribe, which Board of Directors shall also prescribe the provisions of the by-laws of the Regional Agricultural Credit Corporation of Sioux City, Iowa.

In Witness Whereof, the Reconstruction Finance Corporation has caused this charter to be signed by its executive officer, Chairman of its Board of Directors, attested by its Secretary, and has caused its seal to be hereunto affixed this 10th day of September, 1932.

Reconstruction Finance Corporation, (Signed) by Atlee Pomerene, Chairman. (Seal.)

Attest: (Signed) C. R. Cooksey, Secretary.

EXHIBIT "B" TO PETITION

Assignment of Cause of Action

I, the undersigned, hereby transfer and assign for the purpose of collection to Keifer & Keifer, a co-partnership,

composed of J. Warren Keifer, Jr. and Oswin Keifer, all my right, title and interest in a cause of action against the Regional Agricultural Credit Corporation of Sioux City, Iowa, and the Reconstruction Finance Corporation, because of the possession and control of certain livestock by said Regional Agricultural Credit Corporation of Sioux City, Iowa, and the Reconstruction Finance Corporation during the winter of 1934 and 1935, together with all claims, choses in action and rights growing out of the acts while in the possession and control of said corporation.

That said Keifer & Keifer agree as a part of this assignment that out of any and all moneys collected by suit, settlement or otherwise, the pro-rated cost of conducting any litigation necessary will be deducted from the amount recovered upon the count of the petition setting forth the cause of action of each party joining in any such suit; that after the payment of such items of expense and collection as constitutes my prorated share, I shall receive the amount [fol. 13] recovered or received upon the count setting forth my claim against the above mentioned corporations.

Dated this — day of ——, 1936.

—— ——.

In the Presence of: —— ——.

Duly sworn to by Oswin Keifer. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

SUMMONS AND MARSHAL'S RETURNS—Filed December 17, 1936

The President of the United States of America, to the Marshal of the District of Nebraska, Greeting:

You are hereby commanded to notify the Defendants Reconstruction Finance Corporation, a corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a corporation, that they have been sued by Keifer and Keifer, a copartnership composed of J. Warren Keifer, Jr. and Oswin Keifer, in the District Court of the United States, for the District of Nebraska aforesaid, at Omaha, Nebraska; that unless they answer on or before the 18th day of January, A. D. 1937, the petition of said plaintiff, filed against them in the Clerk's office of said court, will be taken as true and judgment rendered accordingly.

[fol. 14] You will make due return of this Summons on or before the 28th day of December, 1936.

Witness, the Honorable Judges of the District Court of the United States for the District of Nebraska, at Omaha this 14th day of December, 1936.

R. C. Hoyt, Clerk, by John Nicholson, Deputy. (Seal.)

Return On Service of Writ

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I served the annexed Summons on the therein-named Reconstruction Finance Corporation, a corporation, 219 Post Office Building by handing to and leaving a true and correct copy thereof with Herbert S. Daniel, Manager, personally at Omaha, in said District on the 16th day of December, A. D. 1936.

J. C. Byrnes, U. S. Marshal, by Earl J. Young, Deputy.

There being no President, Vice-President, Secretary or Treasurer, or Cashier, or Chairman, of the Board or Other Chief Officer of the above named corporation to be found in my District.

Return On Service of Writ

UNITED STATES OF AMERICA,
District of Nebr., ss:

I hereby certify and return that I served the annexed Summons on the therein-named Regional Agricultural Credit Corporation, of Sioux City, Iowa, a Corporation, at 1817 Douglas Street, by handing to and leaving a true and correct copy thereof with J. Oscar Challman, Manager, personally at Omaha, in said District on the 16th day of December, A. D., 1936.

J. C. Byrnes, U. S. Marshal, by Earl L. Young, Deputy.

There being no President, Vice-President, Secretary or Treasurer, Chairman of the Board, or Cashier or other Chief [fol. 15] Officer of the above named Corporation to be found in my District.

(Endorsed): No. 3627. Law Docket. Marshal's Docket No. 7980. United States District Court, District of Ne-

braska, Omaha Division. Keifer & Keifer a co-partnership, etc., vs. Reconstruction Finance Corporation, a corporation et al.

Summons

If Defendant fail to answer, the Plaintiff will take judgment for $40,976.00, and costs.

Perry, Van Pelt & Marti, Atty. for Plaintiff, Lincoln, Nebraska.

[File endorsement omitted.]

In United States District Court

Motion of Defendant, Regional Agricultural Credit Corporation, to Require Plaintiff to Make Petition More Definite and Certain—Filed February 8, 1937

To The Honorable Judges of the District Court of the United States In and For the Omaha Division of the District of Nebraska:

Comes now the defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, and moves the court to enter an order requiring the plaintiff to make its petition more definite and certain in the following respects: (For the sake of brevity the defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, is hereinafter referred to as "R. A. C. C.").

As to the First Cause of Action

1. In paragraph 4 of the said cause of action:

(a) By stating and naming the person or persons representing the defendant R. A. C. C. to whom the plaintiff delivered the cattle as alleged;

(b) By stating the time when and the place where said cattle were so placed;

[fol. 16] (c) By stating and naming the representative or representatives of the defendants who made the oral agreement with the plaintiff as alleged in said paragraph;

(d) By setting out in substance the conversation which is alleged to have resulted in the oral agreement;

(e) By stating the time when and the place where the said conversation took place;

(f) By stating and naming with respect to each and every allegation in said paragraph which partner or partners or what representative or representatives of said plaintiff heard the alleged conversations or witnessed the alleged acts;

2. In paragraph 5 of the said cause of action:

(a) By stating and naming the representative or representatives of the R. A. C. C. who made the alleged false and fraudulent representations and by the alleged coercion fraudulently induced the plaintiff to enter into the alleged contract;

(b) By stating whether the contract was written or oral, and if the contract was written, by setting out the express terms thereof, and if oral, by stating the substance of the conversation or acts upon which plaintiff claims said oral contract was based;

(c) By stating the time when and the place where said conversation or acts took place;

(d) By stating the substance of the conversation, correspondence or acts which the plaintiff contends amounted to fraudulent representations, coercion, and fraudulent inducement;

(e) By stating the time when and the place where said actions, conversations or correspondence took place;

(f) By setting out the terms of said contract which plaintiff claims are unconscionable, unlawful, unenforceable, and unreasonable;

(g) By setting out in particular in what respects the alleged written contract differed from the alleged oral contract;

(h) By setting out in particular the alleged technical terms in said contract or contracts which allegedly caused the plaintiff to be unaware of the waiver or the meaning thereof in said agreement or agreements;

(i) By stating and naming the representative or representatives of the R. A. C. C. who allegedly threatened that

[fol. 17] plaintiff's cattle would be sold immediately, and to whom the said alleged threat was made;

(j) By stating the place where and the time when said threat was made;

(k) By stating and naming with respect to each and every allegation in said paragraph which partner or partners or what representative or representatives of said plaintiff heard the alleged conversations or witnessed the alleged actions;

3. In paragraph 6 of the said cause of action:

(a) By stating and naming the help on said ranch who were employed by the R. A. C. C. who were allegedly inefficient and unskilled;

(b) By stating and naming the alleged representatives of the R. A. C. C. who drove said cattle in to Whitman in alleged long, unreasonable drives at a fast pace, and who allegedly kept the cattle at night where no feed or water was available;

(c) By stating the time and the distance driven;

(d) By stating the places where said cattle were kept at night on said drive;

4. In paragraph 7 of the said cause of action:

(a) By stating and naming the representative or representatives of the defendants who offered to fatten the 186 calves allegedly in the defendants' possession during the winter months;

(b) By stating and naming the partner or partners, representative or representatives of the plaintiff to whom said offer was made;

(c) By stating the place where and the time when said offer was made;

(d) By stating and naming the representative or representatives of the defendants who allegedly agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain, and so handle said calves that the calves would gain 200 pounds or more per head by late spring of 1935;

(e) By stating whether said agreement was oral or written, and, if written, to set out the exact terms of said agreement, and, if oral, to set out the substance of the conversation which plaintiff claims formed said alleged agreement;

[fol. 18] (f) By stating and naming with what partner or partners, representative or representatives of the plaintiff said alleged agreement was made;

(g) By stating the time when and the place where said alleged agreement was made;

(h) By stating and naming the alleged incompetent, inexperienced and inefficient help employed by the defendants to care for said calves.

As to the Second Cause of Action

5. In paragraph 1 of said cause of action: R. A. C. C. hereby incorporates by reference paragraphs two and three of this motion.

6. In paragraph 3 of the said cause of action:

(a) By stating and naming the person or persons representing the defendant R. A. C. C. to whom the plaintiff delivered the cattle as alleged:

(b) By stating the time when and the place where said cattle were so placed;

(c) By stating and naming the representative or representatives of the defendants who allegedly agreed with the plaintiff as alleged in said paragraph;

(d) By stating whether the agreement was written or oral, and, if written, by setting out the express terms of said agreement, and, if oral, by stating which partner or partners, representative or representatives of the plaintiff made the agreement and the substance of the conversation which plaintiff claims formed said alleged agreement;

(e) By stating the time when and the place where the said agreement was made.

As to the Third Cause of Action

7. In paragraph 1 of the said cause of action: R. A. C. C. hereby incorporates by reference paragraphs two and three of this motion.

8. In paragraph 3 of the said cause of action:

(a) By stating and naming the representative or representatives of the R. A. C. C. in whose hands John R. Jochem allegedly placed 158 head of cattle.

(b) By stating the time when and the place where said cattle were so placed;

[fol. 19] (c) By stating and naming the representative or representatives of the defendants who allegedly agreed with plaintiff as alleged in said paragraph;

(d) By stating and naming the partner or partners, representative or representatives of the plaintiff with whom said agreement was made;

(e) By stating whether said agreement was written or oral and, if written, by setting out the express terms of said agreement, and, if oral, by setting out the substance of the conversation which plaintiff claims formed said alleged agreement;

(f) By stating the time when and the place where said agreement was made.

As to the Fourth Cause of Action

9. In paragraph 1 of the said cause of action: R. A. C. C. hereby incorporates by reference paragraphs two and three of this motion.

10. In paragraph 3 of the said cause of action:

(a) By stating and naming the represent ..ive or representatives of the R. A. C. C. in whose hands Gustav Jochem allegedly placed 78 head of cattle;

(b) By stating the time when and the place where the said cattle were so placed;

(c) By stating and naming the representative or representatives of the defendants who allegedly agreed with plaintiff as alleged in said paragraph;

(d) By stating and naming the partners or partners, representative or representatives of the plaintiff with whom said agreement was made;

(e) By stating whether said agreement was written or oral, and, if written, by setting out the express terms of said

agreement, and, if oral, by setting out the substance of the conversation which plaintiff claims formed said alleged agreement;

(f) By stating the time when and the place where said agreement was made.

As to the Fifth Cause of Action

11. In paragraph 2 of the said cause of action:

(a) By stating and naming what representative or representatives of the defendants made the offer to Charles J. Mach alleged in said paragraph;

[fol. 20] (b) By stating the time when and the place where said offer was made;

(c) By stating and naming what representative or representatives of said defendants made the alleged agreement set out in said paragraph;

(d) By stating the time when and the place where said agreement was made;

(e) By stating whether said agreement was written or oral, and if written, by setting out the express terms of said agreement, and, if oral, by setting out the substance of the conversation upon which the said alleged agreement is founded;

(f) In relation to subdivision (e) of said paragraph of the petition by stating and naming the alleged incompetent, inexperienced, and inefficient help employed by said defendants.

Regional Agricultural Credit Corporation of Sioux City, Iowa, Defendant, by L. W. Powers and C. J. Thurston, by C. L. Thurston, Attorneys.

[File endorsement omitted.]

In United States District Court

Motion of Defendant, Reconstruction Finance Corporation, to Require Plaintiff to Make Petition More Definite and Certain—Filed February 8, 1937

To the Honorable The Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

Comes Now the defendant Reconstruction Finance Corporation and moves the Court to enter an order requiring the plaintiff to make its petition more definite and certain in the manner and form, and in the particulars and respects set out in the motion of the defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, heretofore filed herein on the 8th day of February, 1937, and which motion, with respect to the manner, form, and respects in [fol. 21] which the petition of the plaintiff should be made more definite and certain is by reference thereto made a part of this motion.

Reconstruction Finance Corporation, Defendant, by Francis P. Matthews, Its Attorney.

[File endorsement omitted.]

In United States District Court

Order Sustaining in Part and Overruling in Part Motions to Require Plaintiff to Make Petition More Definite and Certain—Filed March 19, 1937

Now on this 13th day of March, 1937, this matter came on for hearing before the Honorable J. A. Donohoe, one of the Judges of the said district, on the motion of the defendant Regional Agricultural Credit Corporation of Sioux City, Iowa, heretofore filed herein, asking that the plaintiff be required to make its petition more definite and certain in various respects, which motion was also adopted by the defendant Reconstruction Finance Corporation; Mr. Perry Jr. of Perry, Van Pelt and Marti, attorneys for the plaintiff, appeared on behalf of the plaintiff, and Judge L. W. Powers and Mr. C. J. Thurston appeared as attorneys for

the Regional Agricultural Credit Corporation of Sioux City, Iowa, one of the defendants herein, and the Court, being fully advised in the premises and after hearing argument on both sides, finds that said motion should be sustained in part and overruled in part, as follows:

As to the First Cause of Action

As to paragraph 1 of said motion, subdivision:

(a) Sustained.

(b) Overruled as to "By stating the time when" Sustained as to "the place where said cattle were so placed".

(c) Sustained.

(d) Overruled.

(e) Overruled.

(f) Overruled.

As to paragraph 2 of said motion, subdivision:

(a) Sustained.

(b) Sustained as to "stating whether the contract was written or oral and if the contract was written by setting out the express terms thereof" Overruled as to "and if oral [fol. 22] by stating the substance of the conversation or acts upon which plaintiff claims said oral contract was based."

(c) Overruled.

(d) Overruled.

(e) Overruled.

(f) Overruled.

(g) Overruled.

(h) Overruled.

(i) Sustained.

(j) Sustained as to "by stating the place where" Overruled as to "and the time when said threat was made".

(k) Overruled.

As to paragraph 3 of said motion, subdivision:

(a) Sustained.

(b) Sustained.

(c) Overruled.

(d) Overruled.

As to paragraph 4 of said motion, subdivision:

(a) Sustained.

(b) Sustained.

(c) Sustained as to "by stating the place where" Overruled as to "and the time when said offer was made".

(d) Sustained.

(e) Sustained as to "by stating whether said agreement was oral or written, and if written to set out the exact terms of said agreement",
Overruled as to "if oral, to set out the substance of the conversation which plaintiff claims formed said alleged agreement".

(f) Sustained.

(g) Overruled as to "by stating the time when", Sustained as to "the place where said alleged agreement was made".

(h) Sustained.

[fol. 23] As to the Second Cause of Action

As to paragraph 5 of said motion, consistent rulings should be made throughout in each cause of action as to paragraphs two and three of said motion where applicable.
As to paragraph 6 of said motion, subdivision:

(a) Sustained.

(b) Overruled as to "by stating the time when", Sustained as to "the place where said cattle were so placed".

(c) Sustained.

(d) Sustained as to "by stating whether the agreement was written or oral, and if written, by setting out the express terms of said agreement",

Overruled as to "and if oral, by stating which partner or partners, representative or representatives of the plaintiff

made the agreement and the substance of the conversation which plaintiff claims formed said alleged agreement".

(e) Overruled as to "by stating the time when", Sustained as to "the place where the said agreement was made".

As to the Third Cause of Action

As to paragraph 8 of said motion, subdivision:

(a) Sustained.

(b) Overruled as to "by stating the time when", Sustained as to "the place where said cattle were so placed".

(c) Sustained.

(d) Sustained.

(e) Sustained as to "by stating whether said agreement was written or oral and, if written, by setting out the express terms of said agreement", Overruled as to "and, if oral, by setting out the substance of the conversation which plaintiff claims formed said alleged agreement",

(f) Overruled as to "by stating the time when", Sustained as to "and the place where said agreement was made".

As to the Fourth Cause of Action

As to paragraph 10 of the said motion, subdivision:

(a) Sustained.

[fol. 24] (b) Overruled as to "by stating the time when", Sustained as to "and the place where said cattle were so placed".

(c) Sustained.

(d) Sustained.

(e) Sustained as to "by stating whether said agreement was written or oral, and if written, by setting out the express terms of said agreement",

Overruled as to "and, if oral, by setting out the substance of the conversation which plaintiff claims formed said alleged agreement".

(f) Overruled as to "by stating the time when", Sustained as to "and the place where said agreement was made".

As to the Fifth Cause of Action

As to paragraph 11 of said motion, subdivision:

(a) Sustained.

(b) Overruled as to "by stating the time when", Sustained as to "and the place where said offer was made".

(c) Sustained.

(d) Overruled as to "by stating the time when", Sustained as to "and the place where said agreement was made".

(e) Sustained as to "by stating whether said agreement was written or oral, and if written, by setting out the express terms of said agreement", Overruled as to "and, if oral, by setting out the substance of the conversation upon which the said alleged agreement is founded".

(f) Sustained.

Wherefore It Is Considered And Ordered By The Court: That said plaintiff should be, and it hereby is, required to make its petition more definite and certain in the various respects as set out above, and that the motion should be, and hereby is, overruled in part as set out above.

By The Court,

J. A. Donohoe, District Judge.

[File endorsement omitted.]

[fol. 25] In United States District Court

[Title omitted]

Supplemental Petition—Filed March 29, 1937

The original petition filed in the above action is amended by the plaintiff herein in the following respects:

(1) Paragraph 4 of the first cause of action of said petition is amended to read as follows:

(4) That on or about the 21st day of October, 1934, plaintiff delivered to the defendant Regional at Burwell, Ne-

braska, and other places plaintiff is at this time unable to name, through its duly authorized and acting agent, Sid Manning, and others whom plaintiff is at this time unable to name, 388 head of cattle consisting of 197 cows, 5 bulls and 186 calves; that defendants orally agreed through their duly authorized and acting agents, Sid Manning, R. B. Genoways and R. Emmett Brickley, and others, whom plaintiff is unable to name at this time, with plaintiff, to winter said livestock in a careful and efficient manner, provide the livestock with good grass land, plenty of feed of all kinds and water, and to have them cared for by experienced and capable livestock men, and defendants through their agents as above set forth, agreed to return to plaintiff all of said livestock in the spring of the year in as good condition as when turned over to defendants; that defendants through the agents as above alleged, agreed to feed and care for such cattle in a competent manner during the winter of 1934-35.

(2) Paragraph 5 of said first cause of action of said petition is amended to read as follows:

(5) That thereafter and after the aforementioned cattle were placed in the hands of defendant Regional, as above alleged, the defendant Regional, by taking advantage of plaintiff's necessities, induced the plaintiff to enter into a pretended contract, a copy of which is attached hereto, made a part hereof and marked Exhibit A, by the terms of which plaintiff purported to waive damages caused by the defendants; that such a waiver of damages is unconscionable, unlawful and unenforcible because of the unreasonableness of the terms thereof, and because said pretended waiver was [fol. 26] obtained by fraud and coercion as follows, to-wit: That the defendant Regional, by its authorized agents, Sid Manning, R. B. Genoways and R. Emmett Brickley, and others, whom plaintiff is unable to name at this time, represented that said written contract was not materially different from the oral contract under which plaintiff had previously given possession of said livestock to the defendant Regional, represented that if plaintiff would sign said written contract, defendant Regional would winter the cattle with plenty of feed, upon good hay land, with experienced and capable men and in the spring the livestock would be returned in better, or as good, condition as when possession was turned over to the defendant Regional; that by turning said cattle hereinbefore described over to the defendant

Regional, plaintiff would be able to avoid loss of any of his livestock; that plaintiff was unskilled in the use of technical terms and was unaware of the pretended waiver contained in said unconscionable agreement or the meaning thereof; that the aforesaid oral representations were relied upon by plaintiff in signing said purported contract; that said representations were relied upon by plaintiff in executing the contract presented by the Regional; that said representations, and each of the same, were false and untrue and that said purported waiver was obtained by fraud and coercion and is of no force and effect; that defendant Regional further threatened by the agents hereinbefore mentioned at Hyannis and other places which plaintiff is at this — unable to name, and by implication from the financial status existing, that the cattle owned by plaintiff, subject to a mortgage to defendant Regional, would be sold immediately; that said purported waiver is of no force and effect because of said fraudulent and unlawful acts of the defendants and the unconscionable terms of said purported agreement.

(3) Paragraph 6 (a) of said first cause of action of said petition is amended to read as follows:

(6) (a) It knowingly employed inefficient help, to-wit, Richard O'Keefe, Bill Hagadorn and Tom Hitchcock and other help whose names plaintiff cannot at this time state, and unskilled management, to-wit, R. Emmett Brickley and R. B. Genoways as advisors and Jess West as manager for the ranch near Whitman, Nebraska, upon which said cattle were placed by the Regional for wintering.

(4) Paragraph 6 (c) of said first cause of action of said petition is amended to read as follows:

(6) (c) Through its duly authorized and acting agents, Sid Manning, and others whom plaintiff is unable to name [fol. 27] at this time, drove the cattle into Whitman in long, unreasonable drives, at a fast pace; kept the cattle at night where no feed or water was available during said drives.

(5) Paragraph (7) of said first cause of action of said petition is amended to read as follows:

(7) That after the delivery of said 388 head of cattle to the defendants and after their arrival at Whitman, Nebraska, the defendants through duly authorized and acting

agents, R. B. Genoways, Sid Manning and others whom plaintiff is at this time unable to name, at Hyannis and other places which plaintiff is at this time unable to state, further orally offered to J. Warren Keifer and Oswin Keifer to fatten the 186 calves in defendants' possession during the winter months; that defendants through said agents hereinbefore named, orally agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain and so handle such calves that the calves would gain 200 pounds or more per head by late spring of 1935; that said plaintiff accepted the offer of the defendants and allowed the defendants to move the calves under the above contract.

That the defendants shipped said calves to Melbeta, Nebraska, and other points which plaintiff is at this time unable to name, and that the defendants thereafter negligently failed to care for and maintain said calves but allowed the same to become greatly damaged by the following negligent acts, to-wit:

(a) Defendants placed said calves and the calves of others in a small feed lot; that the calves were crowded and no space for free movement of the calves was available.

(b) That said calves were not fed regularly or properly.

(c) That said calves were not watered regularly or properly.

(d) That the feed was not kept clean, in that manure was allowed to accumulate to a depth of several feet.

(e) That defendants knowingly employed incompetent, inexperienced and inefficient help, to-wit, S. C. Clarke, L. Ed. Genoways and others which plaintiff is unable at this time to name, to care for said calves.

(f) That no care was given said calves during inclement weather; that no sufficient shelter was provided; that the [fol. 28] water supply available, if any, was allowed to become inaccessible through freezing.

(6) Paragraph 3 of the second cause of action of said petition is amended to read as follows:

(3) That on or about the 7th day of November, 1934, Albert Berzina placed in the hands of the defendant Regional, through its duly authorized and acting agents Jess West,

Richard O'Keefe and Tom Hitchcock near Whitman, Nebraska, 108 Head of Hereford Cattle; that because of various head being withdrawn during the winter season and because of the escape of part of the cattle under the control of the defendants to Albert Berzina's premises, Albert Berzina and defendants mutually agreed to fix the number of cattle defendants wintered for said Berzina at 70 head, and that charges for wintering said cattle could be made on the basis of 70 head of cattle; that the defendants orally agreed, through their duly authorized and acting agent, R. Emmett Brickley, near Whitman, Nebraska, with plaintiff to winter said 108 head of livestock in a careful and efficient manner, provide the livestock with water, good grass land, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men, and defendants agreed to return to Albert Berzina all of said livestock in the spring of the year; that defendants orally agreed, near Whitman, Nebraska, to feed and care for said cattle in a competent manner during the winter of 1934-35.

(7) Paragraph 3 of the third cause of action of said petition is amended to read as follows:

(3) That John R. Jochem on or about the 25th day of October, 1934 placed in the hands of the defendant Regional, through its duly authorized and acting agents, Sid Manning and others whom plaintiff is at this time unable to name, near Brewster, Nebraska, 158 head of cattle as follows: 125 Hereford cows and 33 Hereford branded calves; that the defendants orally agreed, through their duly authorized and acting agents, S. H. McGown, Sid Manning, R. B. Genoways and others, whom plaintiff is at this time unable to state, near Whitman, Nebraska, and other places plaintiff is unable at this time to state, with John R. Jochem to winter said livestock in a careful and efficient manner, provide the live stock with water, good grass land, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men and defendants agreed to return to John R. Jochem all of said livestock in the spring of the year in as good condition as when turned over to defendants, reason-[fol. 29] able loss excepted; that defendants orally agreed through their duly authorized and acting agents, S. H. McGown, Sid Manning, R. B. Genoways and others whom plaintiff is at this time unable to state, near Whitman, Nebraska, and other places plaintiff is unable at this time to state, to

feed and care for said cattle in a competent manner during the winter of [1934-34].

(8) Paragraph 3 of the fourth cause of action of said petition is amended to read as follows:

(3) That on or about the 25th day of October, 1934 Gustav Jochem placed in the hands of the defendant Regional, through its duly authorized and acting agents, Sid Manning, and others whom plaintiff is at this time unable to name, near Brewster, Nebraska, 78 head of cattle; that the defendants orally agreed, through their duly authorized and acting agents, S. H. McGown, Sid Manning, R. B. Genoways and others whom plaintiff is at this time unable to state, near Whitman, Nebraska, and other places plaintiff is unable at this time to state with Gustav Jochem to winter said livestock in a careful and efficient manner, provide the livestock with water, good grass land, plenty of feed of all kinds and to have them taken care of by experienced and capable livestock men and defendants agreed to return to Gustav Jochem all of said livestock in the spring of the year in as good condition as when turned over to defendants, reasonable loss excepted; that defendants orally agreed through their duly authorized and acting agents, S. H. McGown, Sid Manning, R. B. Genoways and others, whom plaintiff is at this time unable to state, near Whitman, Nebraska and other places plaintiff is unable at this time to state, to feed and care for said cattle in a competent manner during the winter of 1934-35.

(9) Paragraph (4) (d) of said fourth cause of action of said petition is amended to read as follows:

(4) (d) Each cow returned to Gustav Jochem by defendants was of $25.00 less value than these same cattle when delivered to defendants, with a total loss to Gustav Jochem and plaintiff upon the 45 cows returned of $1125.00.

(10) Paragraph 2 of the fifth cause of action of plaintiff's petition is amended to read as follows:

(2) That defendants, through their duly authorized and acting agent, Roy Hylton, and others plaintiff is unable at this time to name, at Mullen, Nebraska, and other places which plaintiff is at this time unable to name, orally offered

to Charles J. Mach to fatten 193 head of his calves during [fol. 30] the winter months; that defendants through their duly authorized and acting agents, Roy Hylton, and others whom plaintiff is at this time unable to name, near Mullen, Nebraska, and other places plaintiff is unable at this time to state, orally agreed for a charge of not more than $7.00 per head to ship, feed, care for, maintain and so handle such calves that the calves would gain 200 pounds or more per head by late spring of 1935; that said Charles J. Mach accepted the offer of the defendants and allowed the defendants to move the calves under the above contract.

That the defendants shipped said calves to Melbeta, Nebraska, and other points plaintiff is at this time unable to state, and that the defendants thereafter negligently failed to care for and maintain said calves but allowed the same to become greatly damaged by the following negligent acts, to-wit:

(a) Defendants placed said calves and the calves of others in a small feed lot; that the calves were crowded and no space for free movement of the calves was available.

(b) That said calves were not fed regularly or properly.

(c) That said calves were not watered regularly or properly.

(d) That the feed lot was not kept clean, in that manure was allowed to accumulate to a depth of several feet.

(e) That defendants knowingly employed incompetent, inexperienced and inefficient help, to-wit, S. C. Clarke, L. Ed Genoways and others whom plaintiff is unable at this time to name to care for said calves.

(f) That no care was given said calves during inclement *whether;* that no sufficient shelter was provided; that the water supply available, if any, was allowed to become inaccessible through freezing.

Keifer and Keifer, a Co-partnership Composed of J. Warren Keifer, Jr. and Oswin Keifer, Plaintiff, by Perry, Van Pelt and Marti, Its Attorneys.

[File endorsement omitted.]

[fol. 31] EXHIBIT "A" TO SUPPLEMENTAL PETITION

Application 46538

J. W. & Oswin Keifer,

Bostwick, Nebraska

Cattle Feeding Contract

The undersigned mortgagor, being unable to provide sufficient feed and water for his livestock, hereby consents that the Regional Agricultural Credit Corporation of Sioux City, Iowa, may take possession of the following described livestock included in his chattel mortgage to said corporation dated the 30th day of September, 1933, to-wit:

Number	Breed	Kind	Age	Brand and Location of Brand
197	Hereford	Cows	4-6 Yrs.	K left hip or—ahead of left hip bone
186	Hereford	Calves	6 months	" " " " "
5	Hereford	Bulls	2-7 yrs.	" " " " "

and agrees to deliver said cattle at the Festus Corrothers ranch adjacent to the Village of Whitman, Grant County, Nebraska.

It is agreed that the said Corporation will furnish feed and care to said livestock until the first day of May, 1935, at which time, provided all the terms and conditions of this contract and of said chattel mortgage have been complied with, the mortgagor shall remove said livestock.

It is understood that the cattle of other mortgagors will be fed and cared for on the said ranch. It is estimated by the parties hereto that the cost of feed, care and shelter for said livestock during said period will be approximately $14.00 per head and the mortgagor agrees to execute and deliver to said corporation his promissory note to pay for said estimated expense and agrees that said note shall be secured by the chattel mortgage hereinbefore referred to and such supplemental chattel mortgage as the said corporation may require. The mortgagor agrees that if the pro rata expense of feed and care for said livestock during said period and advanced by said corporation shall exceed the sum of $14.00 per head, based on the total expense for the care of all livestock fed and cared for by the said corporation on said ranch, he will pay the actual pro rata expense per head and execute and deliver to the corporation his promissory note for the amount of said additional expense, together with such supplemental chattel mortgage as the said corporation may demand. It is further agreed that if

the pro rata expense for the feed and care of said live-
[fol. 32] stock shall be less than the amount of $14.00 per head the said corporation will credit the mortgagor on his said note for the difference between the actual pro rata expense per head and the $14.00 per head herein before provided for.

It is agreed that the cost of feed and care aforesaid shall include the cost of the necessary labor, supervision, hay, pasturage, additional feed, insurance on hay and pasturage and all other necessary expenses incurred by the corporation in feeding and caring for all of the livestock which shall be fed and cared for by it on said ranch.

Inasmuch as this service is undertaken by the corporation as an emergency relief measure in an effort to preserve the said livestock for the benefit of the mortgagor, it is agreed that all loss to said livestock from death, injury, disappearance, or any other cause shall be borne by the mortgagor.

It is agreed that in the event of a default by the mortgagor in the terms and conditions of the chattel mortgage above referred to, or in the event that the corporation shall decide it advisable, the corporation may sell said livestock at public or private sale at any place it shall select and that the mortgagor shall be credited upon his loan from said corporation with the proceeds of said sale after deducting the expense of sale and any amount owing by the mortgagor according to the terms of this agreement.

Dated this 3d day of November, 1934.

—— ——, Mortgagor. Regional Agricultural Credit Corporation of Sioux City, Iowa—Omaha Branch, by —— ——.

Witness: —— ——.

In United States District Court

Demurrer of Defendant, Regional Agricultural Credit Corporation to Petition and Supplemental Petition—Filed April 10, 1937

To the Honorable Judges of the District Court of the United States. In and for the State of Nebraska, Omaha Division:

Comes now the defendant, Regional Agricultural Credit Corporation of Sioux City, Iowa, and demurs to the petition

[fol. 33] and supplemental petition of the plaintiff filed herein on the following grounds, to-wit:

1. That the court has no jurisdiction of the person of the defendant.

2. That the court has no jurisdiction of the subject of the action.

3. That several causes of action are improperly joined.

4. That the petition and supplemental petition do not state facts sufficient to constitute a cause of action against this defendant.

5. That there is a defect of parties defendant.

Regional Agricultural Credit Corporation of Sioux City, Iowa, Defendant, by L. W. Powers and C. J. Thurston, by Franklin L. Pierce, Its Attorneys.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEMURRER OF DEFENDANT, RECONSTRUCTION FINANCE CORPORATION, TO PETITION AND SUPPLEMENTAL PETITION—Filed April 14, 1937

To the Honorable Judges of the District Court of the United States For the District of Nebraska, Omaha Division:

Comes Now the defendant, Reconstruction Finance Corporation, and demurs to the petition and the supplemental petition of the plaintiff filed herein for the following reasons and upon the following grounds, to-wit:

1

That the Court has no jurisdiction of the subject matter of this action.

2

That several causes of action are improperly joined.

3

That there is a defect or improper joinder of parties defendant.

[fol. 34] 4

That the petition and supplemental petition of the plaintiff heretofore filed herein do not state facts sufficient to constitute a cause of action against this defendant.

Reconstruction Finance Corporation, Defendant, by Francis P. Matthews, Wm. P. Kelley, Its Attorneys.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

OPINION—Filed August 5, 1937

DONOHOE, D. J.:

We have had under consideration the Demurrers of the defendants, which among other things, challenge the jurisdiction of this Court over the persons of the defendants. Oral arguments have been had, and extensive written briefs have been filed.

We have arrived at the conclusion that the defendants are instrumentalities of the United States created by Congress for the purpose of performing governmental functions; that the United States is the real party in interest. (See Reconstruction Finance Corporation vs. Krauss, 12 Fed. Sup. 44, where cases dealing with the question are collected and discussed.); that since the United States may not be sued without its consent, neither can the instrumentalities of the Government be sued without permission of the Congress. No authority has been granted by Congress to sue these defendants in this jurisdiction, and consequently we hold that the Court is without jurisdiction and that it is incumbent upon the plaintiffs to prosecute their claim elsewhere in the mode and manner authorized.

The Demurrers, and each of them, will be sustained and the cause dismissed. Exception will be allowed.

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

Law. 3627

KEIFER AND KEIFER, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer,

vs.

RECONSTRUCTION FINANCE CORPORATION, a Corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation

DECREE—August 5, 1937

In accordance with the views expressed in the Memorandum of the Court, filed herein this date,

It Is Ordered, by the Court, that demurrers of defendants heretofore filed herein, be, and the same are hereby sustained and the case dismissed at costs of the plaintiff, to all of which said plaintiff excepts.

IN UNITED STATES DISTRICT COURT

APPLICATION FOR LEAVE TO FILE AMENDED PETITION—Filed August 26, 1937

Plaintiff respectfully moves the court for an order vacating the dismissal of the above entitled action heretofore entered upon the 5th day of August, 1937 and authorizing and allowing the plaintiff to file an amended petition in the above entitled cause for the following reasons:

(1) That Charles J. Mach, assignor of the 5th cause of action contained in plaintiff's original petition has become a bankrupt and plaintiff desires to eliminate that cause of action from the said petition.

(2) That plaintiff also desire- to make other small corrections and additions to the allegations of the original petition filed herein.

Keifer and Keifer, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer, Plaintiff, by Perry, Van Pelt and Marti, Its Attorneys.

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING APPLICATION FOR LEAVE TO FILE AMENDED PETITION—August 5, 1937

This cause comes on for hearing upon application of plaintiff for leave to file an Amended Petition, said application having been filed herein this date. The Court being fully advised in the premises, and after due consideration thereof, it is by the Court

Ordered, that said application, be, and the same is hereby overruled, to which the plaintiff excepts.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed August 26, 1937

Keifer and Keifer, a co-partnership, composed of J. Warren Keifer, Jr. and Oswin Keifer, above named plaintiff, in connection with and as a part of their petition for appeal assigns the following errors which they aver were committed by the District Court in its rulings, orders and judgments, and upon which plaintiff relies to reverse the judgment and decree herein, as appears by the record:

(1) The court erred in overruling Plaintiff's motion for leave to file an amended petition over the objection and exception of the plaintiff.

(2) The court erred in sustaining the demurrer of the defendants and each of the same to plaintiff's original petition filed in the above entitled cause.

(3) The court erred in sustaining defendants' motion to make definite and to strike, over the objection and exception of the plaintiff.

(4) The court erred in entering a final judgment of dismissal in favor of the defendants over the objection and exception of the plaintiff.

Perry, Van Pelt and Marti, Attorneys for Plaintiff-Appellant.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed August 26, 1937

To The Honorable James A. Donohoe, United States District Court Judge:

Keifer and Keifer, a co-partnership, composed of J. Warren Keifer, Jr. and Oswin Keifer, plaintiff above mentioned, feeling aggrieved by the judgment and decree rendered and entered in the above entitled cause of action on the 5th day of August, 1937, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in the Assignment of Errors filed herewith, and prays that the appeal be allowed for the correction of said errors and a reversal of said judgment and decree; and that citation be issued as provided by law, and a transcript of the record, proceedings and documents in this cause duly authenticated be sent to the United States Circuit Court of Appeals for the Eighth Circuit under the rules in such case made and provided.

Wherefore, this plaintiff prays an appeal to the United States Circuit Court of Appeals for the Eighth Circuit for the correction of said errors; that an order be made fixing the amount of security to be given in bond without supersedeas to be filed herein and conditioned as the law directs and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the Circuit Court of Appeals.

Perry, Van Pelt and Marti, Attorneys for Plaintiff-Appellant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed August 26, 1937

Upon the petition of the plaintiff herein, it is ordered that an appeal from the judgment and decree heretofore filed and entered in this cause on the 5th day of August, 1937, be and the same is hereby allowed as prayed for; that the appeal bond filed herewith in the sum of $500.00, be, and is approved and that all proceedings herein be stayed; and that an authenticated transcript of the record, proceed-

ings and documents in this case be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

J. A. Donohoe, United States District Judge.

Dated at Omaha, Nebraska, this 26th day of August, 1937.

[File endorsements omitted.]

[fols. 38-39] In United States District Court

Notice of Appeal—Filed August 26, 1937

To The Reconstruction Finance Corporation, a Corporation or Francis P. Matthews, Its Attorney of Record, and to the Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation or L. W. Powers and C. J. Thurston, Its Attorneys of Record:

This is to notify you that the plaintiff, Keifer and Keifer, a co-partnership, composed of J. Warren Keifer, Jr., and Oswin Keifer, in cause No. 3627 Law appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment and decree of this court made and entered herein on the — day of August, 1937.

Perry, Van Pelt and Marti, Attorneys for Plaintiff-Appellant.

Due and timely service of the foregoing notice of appeal is hereby acknowledged to have been made and accepted on this 26th day of August, 1937.

Francis P. Matthews, Attorney for Reconstruction Finance Corporation, a Corporation. L. W. Powers & C. J. Thurston, Attorneys for Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation.

[File endorsement omitted.]

Bond on appeal for $500.00, approved and filed August 26, 1937, omitted in printing.

[fol. 40] Citation, in usual form, showing service on Francis P. Matthews et al., filed August 26, 1937, omitted in printing.

IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT—Filed August 26, 1937

The clerk will kindly prepare a transcript on appeal for the Circuit Court of Appeals, Eighth Circuit, and to consist of the following:

1. Plaintiff's petition.
2. Summons and Marshal's Return.

[fol. 41] 3. Motions of the defendants to make plaintiff's petition more definite, more certain and to strike.

4. The court's ruling on the motion of defendants to make plaintiff's petition more definite and to strike.
5. Supplemental Petition.
6. Demurrers of the Defendants and each of them to plaintiff's petition.
7. The court's ruling on the demurrer of defendants to plaintiff's petition.
8. Application for Order vacating dismissal and allowing plaintiff to file an amended petition.
9. Order denying Plaintiff's application for leave to file an amended petition.
10. All entries of record.
11. Petition for appeal.
12. Assignment of Errors.
13. Order allowing Appeal.
14. Bond on Appeal and Approval.
15. Notice of Appeal.
16. Citation.
17. This Praecipe.

Perry, Van Pelt and Marti, Attorneys for the Plaintiff-Appellant.

Approved as to form, this 26th day of August, 1937.

L. W. Powers & C. J. Thurston, Attorneys for Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation. Francis P. Matthews, Attorney for Reconstruction Finance Corporation, a Corporation.

[File endorsement omitted.]

[fol. 42] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] Appearances of counsel omitted in printing.

[fol. 44] In United States Circuit Court of Appeals

Order of Argument—March 14, 1938

This cause having been called for hearing in its regular order, upon application of counsel for the appellee, Reconstruction Finance Corporation, leave is granted to file its brief although with the brief of the other appellee the two briefs exceed the limit of eighty pages under the rule of this Court. Argument was commenced by Mr. Arthur E. Perry for appellant and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

[fol. 45] In United States Circuit Court of Appeals

Order of Submission—March 15, 1938

This cause having been called for further hearing, argument was resumed by Mr. Arthur E. Perry for appellant, continued by Mr. L. W. Powers for appellee Regional Agricultural Credit Corporation of Sioux City, Iowa, and by Mr. Francis P. Matthews for appellee Reconstruction Finance Corporation, and concluded by Mr. Robert Van Pelt for appellant.

Thereupon this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 46] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1938

No. 11,019

Keifer and Keifer, a Co-partnership, Composed of J. Warren Keifer, Jr., and Oswin Keifer, Appellant,

vs.

Reconstruction Finance Corporation, a Corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation, Appellees

Appeal from the District Court of the United States for the District of Nebraska

Mr. Arthur E. Perry and Mr. Robert Van Pelt (Mr. Ernest B. Perry and Mr. Lloyd J. Marti were with them on the brief) for Appellant.

Mr. Francis P. Matthews (Mr. William P. Kelley was with him on the brief) for Appellee Reconstruction Finance Corporation.

Mr. L. W. Powers (Mr. C. J. Thurston was with him on the brief) for Appellee Regional Agricultural Credit Corporation of Sioux City, Iowa.

Before Gardner, Sanborn and Thomas, Circuit Judges

Opinion—July 7, 1938

Gardner, Circuit Judge, delivered the opinion of the Court:

[fol. 47] This is an action at law for the recovery of damages for alleged acts of negligence. Appellant was plaintiff below, and appellees were defendants. Counsel for appellant in their brief, in referring to the parties, say: "The plaintiff and the plaintiff's four assignors will all be referred to herein by the use of the word 'plaintiff.' The defendant, Reconstruction Finance Corporation, will be designated and referred to herein as 'RFC' and the Regional Agricultural Credit Corporation will be designated herein as the 'Regional.'" Counsel for the respective appellees have adopted this suggestion of appellant, and we shall accordingly so designate the parties in this opinion.

The petition sets forth, in separate counts, five alleged causes of action. Of these five causes of action, four are

brought by plaintiff as assignee, while the other is brought by him in his own right. In all of the five causes of action, it is alleged that plaintiff delivered to the Regional Agricultural Credit Corporation certain cattle, which, in violation of its contract duty, it negligently kept, resulting in damage to plaintiff and his assignors. After the cattle were turned over to Regional a written contract was executed, which in terms purported to release Regional from liability in the care of the cattle. So far as the first four causes of action are concerned, it is alleged that this contract containing a release of liability, was obtained by fraud and duress.

The defendants interposed demurrers to the petition, which, while separate, set up substantially the following grounds: (1) that the court had no jurisdiction of the defendants, nor of the subject matter, because the defendants were immune from suit without the permission of Congress; and (2) that the petition and supplemental petition did not state facts sufficient to constitute a cause of action against the defendants, or either of them.

The court sustained the demurrers, expressing the view that the defendants were instrumentalities of the United States, and hence, were immune from suit in an action sounding in tort, without the permission of Congress. The court thereupon dismissed the action, and this appeal is from the judgment of dismissal.

When this case was orally argued, we were of the view that the petition did not state facts sufficient to constitute a [fol. 48] cause of action and therefore the dismissal was properly sustained, regardless of whether the defendants were subject to suit. We then thought that the clause in the contracts of bailment, which purported to release Regional from liability for loss on account of death, injury, or disappearance of the cattle which were the subject of the contract, was a valid limitation on the liability of the bailee, and as there was no statute in Nebraska rendering such a stipulation void, the question was one of general law on which the Federal Court would follow its own decisions. Since the argument of the case, however, the opinion in Erie Railroad Co. v. Tompkins, 82 L. Ed. 787, has been handed down, and under the decision in that case, it is incumbent upon this court to follow the decisions of the highest court of the state in matters of substantive law. Under

may not, by contract, exempt himself from the consequences of his own negligence. School District v. Randall, 5 Neb. 408; Anderson v. Imhoff, 34 Neb. 335, 51 N. W. 854; Gesford v. Star Van and Storage Co., 104 Neb. 453, 177 N. W. 794. The contract was a Nebraska contract and the cause of action arose in that state. The question of the validity of the contract must therefore be decided by the law of Nebraska. It is necessary to consider the question whether the defendants as governmental agencies are immune from action.

So far as the defendant Reconstruction Finance Corporation is concerned, the demurrer was clearly properly sustained. On September 10, 1932, that corporation, pursuant to Act of Congress, created the defendant Regional Agricultural Credit Corporation, of Sioux City, Iowa. By Executive Order, the President transferred control of the defendant Regional Agricultural Credit Corporation from Reconstruction Finance Corporation to the Farm Credit Administration. This order became effective sixty days subsequent to its date. The transfer, however, was actually made approximately a year and a half prior to the time of the transactions and acts complained of by the plaintiff. The Reconstruction Finance Corporation could not, therefore, be held liable.

It remains to consider whether Regional Agricultural Credit Corporation is such a governmental agency as to be immune from suit. The Reconstruction Finance Corporation was authorized by Act of Congress to create "in any of the twelve Federal Land Bank districts where it may deem [fol. 49] the same to be desirable a Regional Agricultural Credit Corporation with a paid up capital of not less than $3,000,000 to be subscribed by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amount allocated and made available to the Secretary of Agriculture under Section 602 of this Title (Title 15 U. S. C. A.). Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its Board of Directors may prescribe." Following the enactment of this statute, the Reconstruction Finance Corporation issued a charter to Regional Agricultural Credit Corporation of Sioux City, Iowa, its paid up capital coming from public funds as directed by the Act of Congress. It selected the personnel to have charge of the funds and to loan them to

farmers and stockmen, as provided in the Act. It issued detailed instructions for the guidance of those in charge relative to the method and manner of operation. The operations of Regional were placed on a government basis; its telegrams were given a government rate; its officers and employees were required to subscribe to the standard form of oath required of officers and employees of the United States; the making of any false statements in an application for a loan was made an offense against the Government of the United States. It was not required to pay postage, but was recognized as having the franking privilege; it was relieved of the obligation to pay a capital stock tax because it was an instrumentality of the United States; it was relieved from obligation to pay clerks' and marshals' fees in cases filed in the Federal Courts; it was not required to pay the Federal stamp tax. Regional was not permitted to deposit any of its funds in any bank other than the Federal Reserve Bank or one of its branches, and when the funds were so deposited, they were transmitted to the Treasurer of the United States, who held them, together with the capital funds, under a symbol account in the Treasury of the United States. Moneys loaned by Regional or expended by it were paid by checks and vouchers drawn on the Treasurer of the United States. Upon the reduction of its capital, the funds representing such reduction were deposited with the Treasurer of the United States, to the credit of a revolving fund provided for in Section 84 of the Farm Credit Act of 1933 (12 U. S. C. A. Sec. 1148a). When capital funds of the [fol. 50] Regional were not needed for its operation, they were subject to use as a part of the capital of other Regionals, or for such other purpose as Congress might by statute subsequently direct.

The Government of the United States is not subject to suit without its consent, and this consent is expressed only by a statute permitting suit against it, and the courts can not go beyond the letter of such consent where it has been expressed. United States v. Turner (C. C. A. 8), 47 Fed. (2d) 86; North Dakota-Montana Wheat Growers' Assn. v. United States (C. C. A. 8), 66 Fed. (2d) 573; Posey v. Tennessee Valley Authority (C. C. A. 5), 93 Fed. (2d) 726. It is conceded that there is no statute expressly consenting that Regional may be sued, so that the inquiry is whether from the nature of the agency, an intent on behalf of Congress to make this agency subject to suit may be inferred.

Ballaine v. Alaska Northern Ry. Co. (C. C. A. 9), 259 Fed. 183.

It is to be observed that Regional Agricultural Credit Corporations are not created under the general incorporation laws of any state or territory, which laws would ordinarily make the corporation so formed amenable to action in any court. They are creatures of Federal legislation. They are not managed nor controlled as ordinary corporations. Their capital comes directly from the Federal Government, and it is not invested in capital stock because there is no capital stock. There is no board of directors, and there are no stockholders, as in the case of a commercial corporation. Management is by officers and agents appointed by the Farm Credit Administration, or, prior to the transfer, by the Reconstruction Finance Corporation. In no sense is the corporation a private corporation or a commercial corporation and as such subject to action. Kansas City Bridge Co. v. Alabama State Bridge Corp. (C. C. A. 5), 59 Fed. (2d) 48. In North Dakota-Montana Wheat Growers' Assn. v. United States, supra, this court, in an opinion by the late Judge Kenyon, among other things, said:

"Where the government has intended that one of its agencies shall be subject to suit it has provided therefor in the creative act."

Thus, it will be observed with reference to corporations created by Acts of Congress, that the statutes creating them usually contain specific provision that they may sue and be [fol. 51] sued. An examination of forty-three separate Acts of Congress creating governmental corporations discloses that the statutes creating them, with but six exceptions, provide that they may be sued. An omission to so provide in the legislation pertaining to regional Agricultural Corporations is significant. To argue that they may be sued without such provision would mean that the specific provisions in the statutes creating various governmental agencies, authorizing suit against them, are mere surplusage.

Administrative construction of the statute may be of persuasive force. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294; United States v. Madigan, 300 U. S. 500. That Regional Agricultural Credit Corporations were recognized as governmental agencies by the Administrative

Department of the Government is evidenced by the fact, already noted, that they were granted government rates on telegrams; their employees were required to subscribe to the standard form of oath required of officers of the United States; they were granted franking privileges, relieved of capital stock tax, and were clearly recognized as and construed to be governmental agencies. The restrictions with reference to their deposit of funds and the covering of their unused capital into the Treasury of the United States further indicate the governmental character of these agencies. They were government agencies, loaning government funds.

It is argued that the activities of these agencies were such as to take them into the realm of private business and divorce them of their sovereign character. But the loaning of money to assist in the agricultural development of the country, or to save the agriculture of the country from loss or disaster, and the collection of the money so loaned, would not, we think, have the effect of converting the Government into a trading partnership, nor put it into private business. In Langer v. United States, 76 Fed. (2d) 817, it was argued that the Reconstruction Finance Corporation was a private business, rather than a government agency. In the course of the opinion in that case we said:

"The question to be determined is whether Congress has created a corporate entity to act as a part of the government [fol. 52] as a political department, or whether it has adopted a corporate form to be separate from and not to be considered as a part of the government."

We there held that the Reconstruction Finance Corporation was a government agency.

See, also: North Dakota-Montana Wheat Growers' Assn. v. United States, supra.

The authorities relied upon by plaintiff are readily distinguishable. Many of them deal with corporations organized under the general incorporation laws of a state or of the District of Columbia. The very laws under which they are incorporated mark them as private corporations and make them amenable to suit. In addition, it is to be noted that in practically all of the incorporations involved in the cases relied upon by appellant, immunity from suit is expressly waived. The case of Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corpo-

ration, 258 U. S. 549, is strongly relied upon. The Emergency Fleet Corporation was organized under the general incorporation laws of the District of Columbia as a private corporation. Those laws, of course, provided that corporations might be sued. That corporation was authorized to carry on a private business for profit, and others than the Government might own its stock. In the course of the opinion, it is, among other things, said:

"At that time the Emergency Fleet Corporation had only the powers given by the incorporation laws of the District. * * * The Shipping Act contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued. * * * The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person * * *."

A number of the other cases cited involved, in the final analysis, the question of the character of the Emergency Fleet Corporation. For example, in United States v. Strang, 254 U. S. 491, which is cited by appellant, the question involved was whether the employment of Strang by the Emergency Fleet Corporation made him an agent of [fol. 53] the Government. The court held that as the corporation was a private corporation, Strang was not an agency of the Government. The court said:

"Its inspectors were not appointed by the President, nor by any officer designated by Congress."

It is to be noted that Regionals are to be managed by officers and employees appointed by the Farm Credit Administration. As Regional is a governmental agency, and Congress has not seen fit to make it amenable to suit by waiving its immunity, we conclude that the court committed no error in sustaining the demurrers to plaintiff's petition, and the judgment appealed from is therefore Affirmed.

[fol. 54] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11019

KEIFER AND KEIFER, a Co-partnership Composed of J. Warren Keifer, Jr., and Oswin Keifer, Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, a Corporation, and Regional Agricultural Credit Corporation of Sioux City, Iowa, a Corporation

JUDGMENT—July 8, 1938

Appeal from the District Court of the United States for the District of Nebraska

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

[fol. 55] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION OF APPELLANT FOR REHEARING—Filed July 21, 1938

Appellant respectfully moves the court to grant a rehearing in the foregoing case and to vacate and set aside the opinion and judgment of the court rendered on July 7, 1938, upon the following grounds, to-wit:

[fol. 56] (1) For failure to consider and grant appellant's application for leave to amend the petition made in the trial court and to reverse the trial court's order refusing appellant permission so to do.

(2) For refusal to reverse the order of the trial court sustaining the demurrer of the appellees and each of the same to appellant's petition.

(3) For refusal to reverse the order of the district court entering a final judgment of dismissal in favor of the defendants and appellees.

(4) For error in holding that the defendant and appellee Regional Agricultural Credit Corporation of Sioux City, Iowa, was immune from suit.

The court did not have before it for consideration the excellent, able and correct decision on this point rendered by the Minnesota Supreme Court in the case of Casper v. R. A. C. C., 278 N. W. 896 because the cited case was decided after the submission of the pending case to this court. The Minnesota case expressly refuses to follow the ruling of the United States District Court deciding the pending case, and in a carefully reasoned opinion, abundantly supported by accepted authorities, answers every argument made by the Regional and presented by this court in its opinion in this case. We quote the following from the opinion of the cited case:

"Regional agricultural credit corporations are not immune from suit. Reconstruction Finance Corporation, Art. Sec. 201 (e), 15 U. S. C. A. Sec. 605b (e). (Syl. 2).

"Defendant cites and relies on Keifer & Keifer v. Reconstruction Finance Corporation et al., 22 F. Supp. 918, decided August 5, 1937, by the United States District Court, District of Nebraska, holding that a regional agricultural credit corporation may not be sued without the consent of Congress and that Congress has not given such consent. With utmost deference to the court which decided that case, we refuse to follow it because we think congressional consent to suit has been given.

* * * * * * *

[fol. 57] "A grant of corporate existence is itself a grant of power to sue and be sued. Those incidents, unless expressly withheld, exist without specific enumeration. 3 Thompson, Corporations, 3d Ed., Sec. 2180, p. 821; 1 Cook, Corporations, 8th Ed. Sec. 3, p. 16; 2 Kent's Commentaries, 13th Ed., 369; 1 Chitty's Blackstone 395, where it is stated that the incidents of a corporation, including the power to sue and be sued, implead and be impleaded, 'are necessarily and inseparably incident to every corporation * * * as soon as a corporation is duly erected * * *'; 6 Viner's

Abr. 265 (G), 'When a corporation is duly created, all other incidents are tacitly annexed. As if the king makes a general corporation * * * without any words of license * * * yet the corporation may purchase, plead, or be impleaded well enough; for that by the making of the corporation all those necessary incidents are included'; 8 Halsbury's Laws of England 67, 68; 7 R. C. L. 689, Sec. 690; Hancock v. Louisville Railroad Co., 145 U. S. 409, 12 S. Ct. 969, 36 L. Ed. 755; McLoud v. Selby, 10 Conn. 389, 27 Am. Dec. 689; De Haas v. Pennsylvania R. Co., 261 Pa. 499, 104 A. 733; The Case of Sutton's Hospital, 5 Coke, Part X, p. 285. This was the settled rule prior to the decision in the case of Sutton's Hospital in 1612, supra, in which the court said that the power to sue and be sued is one of the incidents of a corporation and that when a corporation is duly created, the 'incidents are tacitly annexed' including the power to sue and be sued, implead, and be impleaded. The expression used in Sutton's Case, that a corporation may sue and be sued, implead, and be impleaded, is still the language of the books. The power of defendant to sue and be sued is implied from the very fact that it is a corporation, the same as though the power had been expressly stated and granted. Such power is a part of defendant's very corporate existence.

* * * * * * *

"The inference that defendant is subject to suit is supported by the fact that its creator, the Reconstruction Finance Corporation, is itself subject to suit. The theory on which immunity is sustained is that the creator has transmitted to the creature its sovereign immunity. The government withheld such immunity from the Reconstruction Finance Corporation. It thus indicated a general policy of subjecting the Reconstruction Finance Corporation and its [fol. 58] property to suit and judicial process. True, defendant derives its powers from the statute, but it is hardly to be inferred that immunity would be granted to the creature where it is withheld from the creator. The fact that defendant was created a corporation with all incidents of a corporation would seem to be decisive in the light of other considerations."

Casper v. Regional Agr. Credit Corp., 278 N. W. 896 (Minn.).

The entire opinion of the cited case is carefully written and we believe, because of its inherent justice and logic, it is decisive of the question decided therein and we respectfully submit that a careful examination of the opinion in the cited case will require this court to reverse its ruling and opinion in this case.

The opinion rendered in this case finds only that the Regional is a governmental agency and from that point and from the fact that the employees take an oath of office, and the corporation uses a "franking privilege" etc., the court determines that no authority to sue the defendant Regional exists. Other governmental agencies, which are corporations, are because of their corporate existence, subject to suit. From the incorporation itself, they become subject to suit. It should be noticed that Congress did not create the defendant Regional. The defendant Regional was created by the R. F. C. The congressional statement that the Regional was to be a corporation is Congress' only expression on the question of the defendant Regional's immunity from suit. What form the corporate organization by the R. F. C. took could not effect the congressional intent that the Regional be organized as a corporation and as such be "*presumably subject to suit.*"

These matters do not determine whether the defendant Regional is subject to suit. The Fleet Corporation, the Panama Railroad, the R. F. C. and other corporate governmental agencies have these exemptions and privileges but are held subject to suit. The question of a corporation hav- [fol. 59] ing these exemptions and privileges is entirely beside the point as to whether or not they have immunity from suit.

While we hereinafter respectfully urge that the submission of evidence in the form of an appendix to a brief is improper, however, in view of the recitations from such an appendix in the opinion in this case, we cite the following from a similar appendix attached to the brief of the defendant Regional before the trial court where the memorandum was attached.

Exhibit IX of the defendant Regional's brief filed with this court refers to a "memorandum attached", although it is not so attached. The memorandum contains the following:

"A striking analogy between the United States Shipping Board Emergency Fleet Corporation and that of the Regional Agricultural Credit Corporation appears

• • • • • • •

"While the government did not directly organize the Regional Agricultural Credit Corporation, it granted the power to the Reconstruction Finance Corporation to do so."

Congress authorized the Shipping Board (an incorporated governmental agency, not subject to suit) to form the United States Shipping Board Emergency Fleet Corporation. That was the only congressional expression of intent as to suability.

The United States Shipping Board has been repeatedly held subject to suit and distinguished from its creator, the Shipping Board, which was held not subject to suit. Sloan Shipyards Corp. v. U. S. Shipping Board, 258 U. S. 549, 42 S. C. R. 386; United States Shipping Board Emergency Fleet Corp. v. Eichberg, 14 Fed. (2d) 248; U. S. Shipping Board Emergency Fleet Corp v. Tabas, 22 Fed. (2d) 398; U. S. Shipping Board etc. v. Harwood, 281 U. S. 519, 50 S. C. R. 372.

The United States Food Administrator (an unincorporated governmental agency not subject to suit) created the [fol. 60] United States Grain Corporation. The distinction as to immunity of the organizing agency and the corporation was examined and the corporation held subject to suit.

Phillips v. U. S. Grain Corp., 279 Fed. 244;
U. S. Grain Corp. v. Phillips, 43 S. Ct. R. 283, 261 U. S. 106.

The United States Food Administrator also formed the United States Sugar Equalization Board, Incorporated. The distinction between a governmental board and a corporation was recognized and the corporation held subject to suit.

Federal Sugar Refining Co. v. U. S. Sugar Equalization Board, Inc., 268 Fed. 575.

The Isthmian Canal Commission (an unincorporated governmental agency, not subject to suit) operated through the Panama Railroad Company, a corporation. The distinction

has been repeatedly recognized and the corporation held subject to suit.

Salas v. United States, 234 Fed. 842 (C. C. A. 2);
Panama R. Co. v. Curran, 256 Fed. 768;
Panama R. Co. v. Minnix, 282 Fed. 47.

The Farm Board (an unincorporated governmental agency, held not subject to suit) formed various marketing corporations and this court held those marketing corporations "were distinct entities, duly incorporated, and undoubtedly entitled to sue and be sued as other corporations."

No. Dakota-Montana Wheat Growers Assn. v. United States, 66 Fed. (2d) 573, 92 A. L. R. 1484.

Similar distinctions have been recognized as to the Director of Air Craft Production organizing the United States Spruce Corporation, and the Secretary of War organizing the Inland Waterway Corporation.

See Olson v. U. S. Spruce Corp., 276 U. S. 462, 45 S. C. R. 357.

In the seven examples just mentioned the corporations were formed, created and used by an administrative agency [fol. 61] without any congressional expression as to whether such corporations should be subject to, or immune from, suits. In each instance the corporation was held subject to suit because of its incorporation and despite the immunity from suit of the body organizing such corporations.

In the case of the Regionals there is a similar congressional silence as to the corporations being subject to, or immune from, suit. But Congress required a corporation be formed and further directed creation of the corporation by the R. F. C., itself an incorporated body and subject to suit.

The distinction existing between these seven corporations and the Regional, so far as any congressional expression as to suability, conclusively shows a stronger case as to the Regional being subject to suit than any other corporation. Yet this court would hold that Congress intended all seven of these corporations to be subject to suit and the Regional corporation exempt from suit. We respectfully submit that the opinion of the Minnesota Supreme Court is correct and that the decision of this court is based upon a distinction which is actually nonexistent.

(5) For Error Committed in Considering Evidence Tendered by the Regional in the Appendix to Its Brief.

That the matters of evidence submitted by the Regional in the appendix to its brief are not properly before the court and that it was error for the court to base its decision thereon is evident. This matter came before the court upon the defendant Regional's demurrer to the plaintiff's petition. Whether the defendant Regional received the governmental rate on telegrams, used the "franking" privilege, were relieved of capital stock tax or whether the Regional's employees took an oath, were matters not before the court and could not be considered by the court without plaintiff being given an opportunuity to introduce evidence on these points. Nevertheless a large portion of the opinion in this case is used in discussing matters on which "evidence" was [fol. 62] offered in the appendix of the defendant Regional's brief.

We further call to the court's attention that the matters set forth in the appendix to the defendant Regional's brief are not within the rule allowing the court to take judicial notice of rules and regulations under the cases cited in the defendant Regional's brief and are not an administrative construction of the statute which it is proper to consider on demurrer, under the rule of the cases cited by the court in support of that proposition for the following reasons:

(1) The matters contained in the appendix are not by any stretch of the imagination rules and regulations under the provisions therefor authorized by Congress.

(2) The matters set forth in the appendix are inter-office communications which are by the very terms thereof "confidential, not for publication", and we call to the court's attention that that provision is expressly set forth in the appendix in regard to exhibits 2, 4, 5, and 11 and is by the very substance of the other exhibits, shown to be true of them also. Such confidential communications between Washington bureaus cannot effect the immunity from suit of the defendant Regional, particularly as against the plaintiff herein against whom such secret communications would not even be admissible in evidence.

(3) The matters contained in the appendix do not involve a construction of a statute because the matters set forth therein have been repeatedly held separate and dis-

tinct problems from the problem as to whether the particular corporation was subject to suit. See Federal Land Bank of St. Louis v. Priddy, 295 U. S. 229, 55 S. C. R. 705; Sloan Shipyards Corp v. United States Shipping Board, 42 S. C. R. 386, 258 U. S. 549, 66 L. Ed. 762; Olson v. United States Spruce Corp., 267 U. S. 462, 45 S. C. R. 357, 69 L. Ed. 738; United States Shipping Board Emergency Fleet Corp. [fol. 63] v. Harwood, 281 U. S. 519, 524-526, 50 S. C. R. 572, 74 L. Ed. 1011; Casper v. Regional Agri. Credit Corp., 278 N. W. 896 (Minn.).

The provisions in regard to lending policies shown in exhibit 2 of the appendix to d fendant Regional's brief, shows that the Regional is by its very nature competitive with private business and upon that ground if no other is subject to suit. The organization of the Regional was by the R. F. C. and no expression of the Regional's immunity from suit is made either by Congress or by the charter issued by the R. F. C. Under the authority given by Congress, the Regional could have been organized under the law of any state of the United States or under the laws of the District of Columbia. Compare with Federal Sugar Refining Co. v. U. S. Sugar Equalization Board, Inc., 268 Fed. 575.

The holding of this court that the Regional is a governmental agency is not decisive of the question of whether the defendant Regional is immune from suit. The questions to be decided are—Did Congress make the Regional subject to suit or did Congress make the Regional immune from suit? Where as here, Congress has taken no direct position upon the matter, and has allowed the R. F. C. to organize a corporation as it saw fit, matters decisive of the question are:

(1) The R. F. C., itself a governmental agency subject to suit, was authorized to create the Regional.

(2) The Regional was authorized to engage in commercial enterprises, authorized to lend money and thus inferentially empowered to bring suit to collect the same and to be subject to suit as an ordinary business corporation.

(3) A separate corporation was to be formed rather than a board or commission as the Shipping Board, Grain Board, Sugar Equalization Board, etc., exempt from suit as distinguished from their comparable corporations organized by the Boards and Commissions which corporations were held to be subject to suit.

[fol. 64] (4) The Regional was under no circumstances immune from suit for a tort committed by it and the plaintiff is not "cut off" from a remedy against the agents that did the wrongful act.

The case of Casper v. Regional Ag.. Credit Corp., supra, arrives by a logical and unanswerable process of reasoning at the conclusion that Congres: expressly shows its intention that the Regional be subject to suit and if consideration is given to the reasoning of that opinion, the ruling in this case must be the same; that the Regional is subject to suit.

Respectfully submitted, Ernest B. Perry, Robert Van Pelt, Lloyd J. Marti, Arthur E. Perry, Attorneys for Appellant.

[fol. 65] Certificate

I, Ernest B. Perry, undersigned counsel for petitioner, hereby certify that in my opinion the foregoing petition for rehearing in said cause is well founded and is not made for the purpose of delay.

Ernest B. Perry, Counsel for Petitioner.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—August 9, 1938

The petition for rehearing filed by counsel for appellant in this cause having been considered, It is now here ordered by this Court that the same be, and it is hereby, denied.

In United States Circuit Court of Appeals

Motion of Appellant for Stay of Mandate—Filed August 18, 1938

Keifer & Keifer, etc., Appellant, respectfully moves the court to stay the execution or enforcement of the judgment entered by this court on July 7, 1938 affirming the judgment of the United States District Court for Nebraska, Omaha Division, and further moves the court to stay the issuance

of the mandate in the above entitled action, said stay to be conditioned upon appellant perfecting an appeal from the judgment of this court of July 7, 1938 on or before the 6th day of October, 1938, and upon the perfection of said appeal said stay is to be until such time as a petition for writ [fol. 66] of certiorari is refused by the United States Supreme Court or until an affirmance of the opinion and judgment of this court by said United States Supreme Court upon the following grounds, to-wit:

(1) That appellant plans intends and will take an appeal from the judgment of this court to the United States Supreme Court by means of a petition for writ of certiorari.

Keifer & Keifer, a Co-partnership, Appellant, by Perry, Van Pelt and Marti, Their Attorneys.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—August 22, 1938

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 67] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 68] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, limited to the first question presented in the petition.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Ernest B. Perry. File No. 42,849. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 364. Keifer and Keifer a Co-partnership, Composed of J. Warren Keifer, Jr., and Oswin Keifer, petitioner, vs. Reconstruction Finance Corporation and Regional Agricultural Credit Corporation of Sioux City, Iowa. Petition for a writ of certiorari and exhibit thereto. Filed September 20, 1938. Term No. 364, O. T., 1938.